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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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In re KARISSA S., a Person Coming Under  
the Juvenile Court Law.

DEPARTMENT OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

RAQUEL S.,

Defendant and Appellant.

C037931

C038604

(Sup. Ct. No. 2287301)

In these consolidated cases, Raquel S., mother of the minor, appeals from the judgment of disposition removing the minor from her custody and denying her services and from denial of her subsequent petition for modification. (Welf. & Inst. Code, §§ 388, 395 [further undesignated section references are to this code].) Appellant contends the court erred in selecting a biased expert to evaluate the parent/child bond and abused its

discretion by failing to apply the proper standard when considering the evidence. We affirm.

#### FACTS

The Department of Health and Human Services (DHHS) removed nine-month-old Karissa from appellant's custody in July 2000 alleging that appellant and the minor's father were both substance abusers, currently in custody on criminal charges and unable to provide adequate care for the minor. Appellant had been arrested on theft and drug-related charges and was pending sentencing on multiple forgery charges. A prior referral had resulted in the minor's older sibling being placed with that sibling's father.

The report for the jurisdictional hearing stated appellant admitted stealing money so she could buy drugs and knew she would be sentenced to state prison. At the jurisdictional hearing, the court ordered services for appellant pending disposition.

The dispositional hearing was continued several times while appellant tried to get accepted into a prison program for mothers and infants. According to the report for the hearing, appellant was sentenced to four years in state prison. DHHS recommended the court deny her reunification services because appellant would not be able to reunify within six months and delay in a permanent plan would be detrimental to the minor. The report noted appellant had applied for the mothers and infants program but DHHS had no information on how long the approval process would take. The minor currently was placed in a foster/adoptive home and her development was age appropriate. Appellant had not had

physical contact with the minor in four months and no contact at all in the last two months.

The contested dispositional hearing was held in January 2001. Appellant conceded there was little basis to argue against denial of services and submitted on the social worker's report because she had not yet been accepted into the prison program but hoped to bring a petition for modification if that occurred. The court cautioned appellant that the standard to be met for such a petition was best interests of the minor and adopted the findings and orders recommended by DHHS which included denial of services for appellant and providing services for the minor's father.

In April 2001, appellant filed a petition for modification of the orders denying her services. Appellant alleged her circumstances had changed since the dispositional hearing because she had been accepted into the mother and infant prison program and the minor could be placed with her as soon as space was available. Appellant alleged the modification would be in the minor's best interest since the minor had a bond to her. The court granted a hearing on the petition.

An interim report filed in April 2001 confirmed appellant had been accepted for the prison program and that her projected release date was September 2002. According to the report, the minor's father had made no effort to reunify with the minor. An addendum filed in May 2001 recommended the court deny appellant's request for placement of the minor because there was no evidence of appellant's rehabilitation from crime and substance abuse and appellant would not be able to demonstrate rehabilitation until

after she was released. The addendum further stated the minor had shown some difficulty with attachment issues. DHHS was concerned that, if the minor were moved from her current caretaker, she could develop serious problems, particularly since a gradual transition would not be possible. A letter from Susan Thompson, a child therapist consulted by the foster mother, was attached to the addendum. The letter stated the therapist had assessed the minor's attachment to the foster mother and found that the minor was now strongly bonded to the foster mother. The therapist was concerned about disrupting the relationship because that could cause permanent damage to the sensitive minor.

The hearing on the petition for modification commenced May 11, 2001. Appellant presented evidence from a friend and family members who were familiar with her interaction with her children that she had provided them good care and that there had been a bond between appellant and the minor. Appellant's adoptive mother testified appellant began using drugs in December 1999 after the minor was born but that since her incarceration, appellant showed an increased understanding of the consequences of her behavior and had expressed remorse.

Appellant testified she had been accepted into the prison program for mothers and infants and wanted the minor returned to her custody so she could focus on bonding with the minor. Appellant did not want to jeopardize the minor's current placement but believed she could re-attach to the minor and that the minor needed to be with her because she was the minor's biological mother. Appellant admitted she had recently attempted

to contact the minor's father despite their history of violence and substance abuse. Appellant testified she had participated in the limited programs available to her in prison while trying to get into the program for mothers and infants.

The first social worker assigned to the case testified she had arranged weekly visits with the minor while appellant was in local custody. During those visits, the minor clearly recognized appellant and responded positively to her. The social worker also arranged visits when appellant returned from state prison for the dispositional hearing in January 2001. At that time it had been several months since the minor had seen appellant. During the first visit, the minor made little eye contact with appellant and it appeared to the social worker that the minor thought she should know appellant but could not remember why. At the next visit the minor was more animated and would look at appellant, but the social worker saw a big difference between these visits and the earlier ones. The social worker saw nothing during the visits to indicate the minor had any affection for appellant.

The current social worker testified she was told appellant had been approved for the prison program for mothers and infants in March 2001, although the actual approval had occurred earlier. The program provided a home-like environment for mothers with children in which the mothers could receive treatment for substance abuse, parenting instruction and counseling. After a department staffing, the social worker informed the Department of Corrections that the minor's placement should not be changed.

The social worker stated that appellant had completed a parenting class.

Initially, the child and infant therapist, Susan Thompson, testified only about her assessment of the relationship of the minor and the foster mother. Thompson testified the foster mother contacted her after a presentation Thompson had made in a program for the Family Services Agency designed to provide free therapy for abused children. The foster mother was concerned about the minor's behavior and made an appointment with Thompson to observe the minor for a possible attachment disorder. The foster mother was concerned that the precipitous moves from appellant to foster care to the current home may have resulted in an attachment disorder. Thompson observed the minor and saw no cause for concern, but instructed the foster mother in strategies for dealing with the minor's excessive crying and episodes of screaming. Several follow-up observations occurred over the next three months. Thompson observed no attachment issues and felt the minor's reported behavioral problems were due more to an adjustment problem than an attachment problem. Thompson was pleased with her observations of the minor's behavior and bonding to the foster mother. It was clear to Thompson that the foster mother had done a lot of work with the minor to help her through the abrupt transition. Thompson noted that such transitions from caretaker to caretaker are potentially damaging to a child who could be traumatized by sudden changes. Thompson did not recommend another placement change for the minor since emotional damage within the first three years can have serious long-term

results and additional trauma inflicted on this minor would not be in her best interests.

In response to questioning by the court, Thompson acknowledged she could only make assumptions about the minor's relationship to appellant without observing them and had assumed that appellant was emotionally unavailable to the minor since appellant abused drugs. Thompson was very diffident about her qualifications to conduct a forensic parent-child assessment, finally acknowledging she could perform such an evaluation but had not done so for court proceedings before.

Counsel for the minor asked the court to order a parent-child assessment, suggesting another professional who had performed such evaluations for the court in the past. The court suggested that Thompson perform the evaluation instead. Appellant's counsel had no concerns about Thompson's professionalism but was concerned about how Thompson became involved in this case and the possibility of therapeutic bias. The court questioned Thompson about a possible conflict of interest or allegiance to the foster parent due to the prior contacts. Thompson made it clear that her allegiance and concern was with the minor and not to either the foster parents or appellant. Thompson assured the court she could be objective in assessing the parent-child relationship and wanted only what was best for the minor. The court appointed Thompson to perform the parent-child assessment.

Thompson's report, filed in May 2001, stated she had observed appellant and the minor interact and also interviewed

appellant. She concluded that appellant was bonded to the minor but it was possible that appellant's substance abuse had negatively impacted the minor's bond to appellant. Thompson observed no current attachment on the part of the minor to appellant. Thompson recommended maintaining the minor in her current placement because interruption of the minor's attachment to the foster family would be traumatic and dispose her to lifelong behavioral problems. In Thompson's opinion, the minor was recovering from prior separation-induced trauma and needed stability.

When the contested hearing resumed, Thompson reiterated that the minor displayed no attachment issues and credited the foster mother's parenting ability for this state of affairs since the minor was able to attach to the foster parent and had a healthy ability to do so. Thompson also testified about the parent-child assessment and her conclusions. Thompson found appellant's parenting skills very appropriate and also found it significant that appellant recognized the minor's absence of emotional attachment to her. Nonetheless, Thompson continued to believe, based upon her observation of the minor with both appellant and the foster mother, that a change in placement would be detrimental to the minor. In Thompson's opinion, even if the minor did reattach to appellant, appellant's potential for relapse into drug use was still present and the benefit to the minor of remaining in a stable home, given her current emotional functioning, outweighed the benefit of being with appellant in the prison program. There was a risk the minor would be unable



to reattach to appellant due to the minor's history and nature. Thompson noted that some children never recover from abrupt moves and that, even with therapeutic support, there could be residual emotional damage to the minor. Thompson, who had listened to some of appellant's testimony, was concerned about appellant's ability to remain a nurturing parent and stay off drugs after her release from prison as well as the damage a relapse by appellant could inflict on the minor.

The foster mother testified about the range of the minor's behavioral problems which included excessive crying, screaming, fear of the foster father, clinging and fussiness. The behaviors had lessened over time, but still occurred when the minor was stressed, as she was by the second observational visit with appellant during the parent-child evaluation at the jail.

In denying the petition for modification, the court found appellant had established a change in circumstances, but failed to rebut the presumption for continued foster care. The court found the minor was no longer bonded to appellant and it would be detrimental to move the minor from her current placement.

#### DISCUSSION

##### I

Appellant contends the court abused its discretion in appointing the expert, Susan Thompson, who was biased against appellant. The record fails to support this contention.

The juvenile court has discretion to appoint an expert to investigate, render a report and testify as necessary. (Evid. Code, § 730.) As with any witness, the expert's credibility is

at issue and the expert is subject to questioning which may disclose bias. (Evid. Code, § 780.) We conclude the record does not demonstrate the expert was biased and, thus, the juvenile court did not abuse its discretion in appointing her.

Thompson was questioned at length about the circumstances which led to her observation of the minor. She repeatedly stated that therapeutic intervention beyond her observation was unnecessary because the foster mother's parenting was more than adequate to address the minor's adjustment problems. When the parties sought appointment of an expert to perform a parent-child assessment, the court closely questioned Thompson about her qualifications to perform such an assessment and her bias for or against either the foster mother or appellant. None of the parties questioned Thompson's professional qualifications to perform the assessment. All the parties were free to explore the question of bias and those who wished to, did so. Thompson herself stated she could be objective and that her concern was for the best interest of the minor.

The juvenile court heard Thompson's testimony and observed her demeanor prior to making the appointment. The court was in the best position to assess the evidence of her credibility and credentials for the task. No abuse of discretion appears.

## II

Appellant, relying on *In re Jasmon O.* (1994) 8 Cal.4th 398, argues the juvenile court abused its discretion in refusing to return the minor to her custody based solely upon the minor's

bond to the foster parent. Again, the record does not support appellant's contention.

The *Jasmon O.* court had "no quarrel with the assertion that the existence of a successful relationship between a foster child and foster parent [could not] be the sole basis for terminating parental rights or depriving the natural parent of custody in a dependency proceeding." (*In re Jasmon O., supra*, 8 Cal.4th at p. 418.) However, here, as in *Jasmon O.*, the evidence established that the severing of the bond with the foster parents could do serious long-term emotional damage to the minor. (*Ibid.*)

The testimony demonstrated that the minor had been traumatized by removal from appellant's custody and the subsequent moves necessitated by the available foster placements. Further, there was some evidence appellant's substance abuse had a negative effect on the minor's bond to appellant and that appellant's incarceration had resulted in attenuation of the parent-child bond to such a degree that visits became stressful for the minor. Moreover, the therapist's conclusion that returning the minor to appellant's custody would be detrimental to the minor was not based solely upon the bond the minor had with the foster parent, but rather upon the minor's unique nature, her need for stability and the risk of long-term emotional damage posed by reunification with a parent who was herself not stable either in recovery or in her life skills. Several interlocking factors supported the juvenile court's decision and no abuse of discretion occurred.

### III

Appellant argues the court erred in failing to apply the standard set forth in section 361.5, subdivision (e)(3) rather than that applicable to section 388.

Section 361.5, subdivision (e) deals with providing reunification services to incarcerated parents and requires services be provided unless detrimental to the child. However, subdivision (e)(3) provides in relevant part: "Notwithstanding any other provision of law, if the incarcerated parent is a woman seeking to participate in the community treatment program operated by the Department of Corrections . . . , the court shall determine whether the parent's participation in a program is in the child's best interest and whether it is suitable to meet the needs of the parent and child."

In contrast, determination of a petition to modify brought pursuant to section 388 is committed to the sound discretion of the juvenile court and, absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) The petition for modification must include facts showing a change in circumstances and that "the best interests of the child may be promoted by the proposed change in order." (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) The best interests of the child are of paramount consideration when the petition is brought after termination of reunification services. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) In assessing the best interests of

the child in such a case, the juvenile court looks not to the parent's interests in reunification but to the needs of the child for permanence and stability. (*Ibid.*; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

In making this determination, the trial court applied the rebuttable presumption that "continued foster care is in the best interests of the child." This presumption was created by the Supreme Court in the case of *In re Stephanie M., supra*, 7 Cal.4th at page 317. The use of this burden shifting presumption is not contrary to the requirement of section 361.5, subdivision (e)(3) that the decision whether to allow reunification services to an incarcerated parent be based on "child's best interests." The presumption is based on logic and policy and like other presumptions is intended to aid the trier of fact in making the determination required by the statute.

Assuming section 361.5, subdivision (e)(3) applies to a post dispositional petition for modification,<sup>1</sup> it is apparent that, to satisfy either provision, the court must find that the proposed changed order, in this case participation in the community treatment program, is in the child's best interest. If it is not, the suitability of the program to meet the needs of the child is of no moment.

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<sup>1</sup> Although counsel for appellant attempted to discuss the failure to make the determination under section 361.5, subdivision (e)(3), at the dispositional hearing, he failed to make that argument in his brief. Therefore, we do not address it.

Here, although the court did not phrase its findings in the "best interests" language found in case law or in section 361.5, subdivision (e)(3), it was clear that the court found appellant had not met her burden to establish that the proposed changed order would further the minor's best interests by satisfying the minor's need for a stable home in which to recover from the trauma inflicted upon her by appellant's substance abuse. As we have found the court's order denying return of the minor had proper evidentiary support, any error in failing to articulate the best interests standard more explicitly is harmless. Moreover, had appellant wished a more specific finding within the parameters of the statute, it was incumbent upon her to request it. Her failure to do so has waived any error. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.)

#### IV

Appellant argues the juvenile court abused its discretion by not sufficiently considering evidence supporting the minor's ability to bond to appellant.

Our review of the record establishes that the court did not exclude any evidence relating to the minor's ability to bond. On the contrary, the court heard extensive testimony on the minor's relationships with both the foster parents and with appellant and the potential for reattachment under proper conditions with appellant. We presume the court properly performed its function of considering and weighing all the evidence presented before

reaching its conclusion. (Evid. Code, § 664.) Nothing in the record before us suggests otherwise.

DISPOSITION

The judgment of disposition and the order denying the petition for modification are affirmed.

MORRISON, J.

We concur:

SIMS, Acting P.J.

CALLAHAN, J.